REGINA SYLVIA BELTRAN

v.

CHAN SIT YEE

HIGH COURT MALAYA, SHAH ALAM
ZULKEFLI AHMAD MAKINUDIN J
[CIVIL APPEAL NO: MT4-12-120-97]
21 FEBRUARY 2002

CIVIL PROCEDURE: *Pleadings - Importance of pleadings - Judgment based on issue which was not pleaded - Whether judge had erred in law - Whether judgment ought to be set aside*

This was the defendant's appeal (concerning a tenancy agreement made between the plaintiff and the defendant) against the decision of the learned sessions court judge allowing the plaintiff's claim and dismissing the defendant's counter-claim with costs.

Held:

[1] The learned sessions court judge had erred in law when he made his decision based on an issue that was not raised in the pleadings, as he had decided on the issue that the tenancy agreement between the plaintiff and the defendant was not extended: this was not pleaded by the plaintiff nor was it the plaintiff's case as disclosed in the plaintiff's amended statement of claim. The trial judge should have decided the issue raised in the pleadings and not otherwise. (p 382 f-g)

[Appeal allowed.]

Case(s) referred to:
Aik Ming Sdn Bhd v. Chang Ching Chuen & Ors And Another Appeal [1995] 3 CLJ 639 ***(refd)***
Blay v. Pollard & Morris [1930] 1 KP 628 ***(foll)***
Clarity Heights Sdn Bhd v. Syarikat Samland Sdn Bhd [1999] 4 MLJ 485 ***(refd)***
Hadmore Productions v. Hamilton [1983] 1 AC 191 ***(foll)***
Hj Mohamed Dom v. Sakiman [1956] 22 MLJ 45 ***(foll)***
Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd [1980] 1 MLJ 22 ***(foll)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 14 r. 14(1)

For the appellant - Yee Teck Fah (Ling Ping); M/s Yee Teck Fah & Co
For the respondent - BO Anthony; M/s Cheah Poh Geh & Assoc

Reported by Suresh Nathan

JUDGMENT

Zulkefli Ahmad Makinudin J:

The Appeal

This is an appeal by the appellant against the decision of the learned Sessions Court judge given on 19 June 1997 allowing the respondent/plaintiff's claim and dismissing the appellant/defendant's counter-claim with costs.

The Plaintiff's Case

The plaintiff's pleaded case as set out in his amended statement of claim is as follows:

1. Paragraph 2 of the amended statement of claim avers that by an agreement dated 15 November 1989 (hereinafter referred to as "Tenancy Agreement") made between the plaintiff and the defendant, the plaintiff let to the defendant the entire ground mezzanine floor of the premises for a period of two (2) years from 1 October 1989 to 30 September 1991.

2. Paragraph 3 of the amended statement of claim avers that it was *inter alia* an express term of the Tenancy Agreement that the term of the tenancy could be extended for a further two years based on the same terms except that the rent shall be the open market value of the rental of similar premises in the same locality.

3. Paragraph 4 of the amended statement of claim avers that the Tenancy Agreement have been extended for a further period of two years at a monthly rental of RM6,700 per month commencing on 1 October 1991.

4. Paragraph 5 of the amended statement of claim avers that the defendant has breached the Tenancy Agreement by failing to pay the rental of the premises for the period from 1 April 1992 until 30 June 1992 and that the plaintiff was compelled to take legal action for the arrears of rental.

5. Paragraph 6 of the amended statement of claim avers that the tenancy was therefore terminated by the plaintiff solicitors' letter dated 29 May 1992, which was served on the defendant on 30 May 1992.

The Defendant's Case

The defendant in her pleaded case as set out in her amended statement of defence and counter-claim admitted that she had entered into the said Tenancy Agreement with the plaintiff. However the defendant denied she had agreed that the Tenancy Agreement had been extended for a further period of two years at a monthly rental of RM6,700 per month commencing on 1 October 1991. The defendant contended that the monthly rental was based on the

current market value and at the material time it was between RM4,500 and RM4,800 and not RM6,700. The defendant avers that she relied on the representation of the plaintiff to extend the Tenancy Agreement for a further period of two years from the expiry date of the first two year term tenancy and had thereafter paid the rental at a rate of RM6,700. The defendant further avers that in the month of April 1992 she discovered that the rate of rental based on the current market value for the similar type of premises in the same vicinity was not RM6,700 a month but the true market value is between RM4,500 and RM4,800 a month. The defendant thereafter informed the plaintiff that the correct rate of rental should be between RM4,500 and RM4,800 a month and requested the plaintiff to reduce the rate of monthly rental accordingly and the balance of the sums of money earlier paid as rental be utilised as rental payments for the following months. The defendant avers that the plaintiff failed or refused to accede to the defendant's said request. The defendant further avers that the plaintiff has unlawfully terminated the Tenancy Agreement with the defendant and the defendant in the result made a counter-claim for damages against the plaintiff.

There are a number of grounds relied on by the defendant in this appeal as stated in the memorandum of appeal. However the main grounds of appeal by the defendant that can be restated here are as follows:

1. That the Sessions Judge had erred in law when he made his decision based on an issue that was not raised in the pleading.

2. That the Sessions Judge had erred in fact and in law when he found that the plaintiff had succeeded in proving all the claims against the defendant, when such a finding is not supported by the oral and documentary evidence produced by the plaintiff.

3. That the Sessions Judge had erred in fact and in law when he decided that the defendant is estopped from stating that the defendant did not agree with the new rate of rental of RM6,700 a month even though the issue of estoppel was not raised by the plaintiff or pleaded in the statement of claim.

4. That the Sessions Judge had erred in law and in fact when deciding that the notice of termination of the Tenancy Agreement had been duly served by the plaintiff on the defendant even though there was no evidence to support such a finding. Alternatively, the defendant claimed that the said notice of termination was not validly served by the plaintiff on the defendant.

5. That the Sessions Judge had erred in law and in fact when he decided that the defendant failed to adduce evidence to support the defendant's counter-claim even though the defendant had produced two witnesses and both the defendant's witnesses had given evidence for the defendant.

Decision Of The Court

Having studied the Appeal Record and having heard the submission of learned counsels for the appellant/defendant and the respondent/plaintiff I find that the learned Sessions Judge who tried this case had erred in law when he made his decision based on an issue that was not raised in the pleading. It can be clearly gathered from the amended statement of claim that the plaintiff's claim against the defendant is based on the Tenancy Agreement which had been extended for a further period of two years and except for the monthly rental, the plaintiff and the defendant were bound by the terms contained therein. However, the learned Sessions Judge at p. 30 part B of the Appeal Record held as follows:

> Selepas mendengar keterangan saksi-saksi plaintif dan saksi defendan Mahkamah mendapati di dalam kes ini terdapat tenancy baru mulai 1.10.91. Tenancy mulai September 89 hingga 30.9.91 telah tamat dan tidak diperbaharui, oleh itu tidak timbul soal jumlah rental at market price.

Further at p. 32 para. 1 of part B of the Appeal Record, the learned Sessions Judge said: "Selepas tamat tempoh penyewaan itu, defendan **masih menduduki premis tersebut** sehingga 13 October 1992 dan telah membayar kadar sewa RM6,700 sebulan." It is my view that when the learned Sessions Judge said, "masih menduduki premis tersebut", he failed to appreciate that the defendant was in the premises pursuant to the Tenancy Agreement which had been extended for a further period of two years. By reason of the matters aforesaid, the learned Sessions Judge had clearly decided on an issue which was not pleaded, that is to say, he had decided on the issue that the Tenancy Agreement was not extended which was not pleaded by the plaintiff nor was it the plaintiff's case as disclosed in the plaintiff's amended statement of claim.

There are a number of case authorities which have held that the trial judge must decide the issue raised in the pleadings and not otherwise. The most instructive is perhaps by Lord Diplock in the case of *Hadmore Productions v. Hamilton* [1983] 1 AC 191 wherein at p. 233 his Lordship had this to say:

> Under our adversary system of procedure, for a judge to disregard the rules by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given the opportunity of stating what his answer to it is … .

It is an accepted rules of procedure that parties are bound by their pleadings and are not allowed to adduce facts which they have not pleaded. Pleadings inform one party what the case of the opposite party is, which will have to meet before and at the trial. Pleadings also serve to inform the court what the precise matters in issue are between the parties, issue which the court alone may adjudicate. On this point in the case of *Blay v. Pollard & Morris* [1930] 1 KP 628; his Lordship Scrutton LJ *inter alia* had stated as follows:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

In the Court of Appeal case of *Haji Mohamed Dom v. Sakiman* [1956] 22 MLJ 45, his Lordship Mathew CJ at p. 45 had this to say:

> I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on record, which in this case they were not.

Based on this ground alone and relying on the case authorities hereinbefore cited the judgment obtained by the plaintiff against the defendant must be set aside and the appeal be allowed.

It is also my finding that the learned Sessions Judge further erred in holding that the defendant was estopped from saying that she did not agree to the monthly rental of RM6,700 notwithstanding the issue of estoppel has not been specifically pleaded by the plaintiff in his amended statement of claim nor is the issue of estoppel put to the plaintiff's or defendant's witnesses. At p. 33 of part B of the Appeal Record, the learned Sessions Judge stated: "Selepas mendengar keterangan saksi plaintif dan saksi defendan, mahkamah berpendapat setelah defendan membuat kadar bayaran sebanyak RM6,700 mula 1 Oktober 1991 selama enam bulan, maka beliau diestop untuk menyatakan beliau tidak setuju dengan kadar sewaan itu."

It must be noted that under O. 14 r. 14(1) of the Subordinate Courts Rules 1980 estoppel must be specifically pleaded. The plaintiff never raised the plea of estoppel in his pleadings. Therefore, the plaintiff cannot now rely on the defence of estoppel, as it had opportunity to do so, but did not.

In the case of *Clarity Heights Sdn Bhd v. Syarikat Samland Sdn Bhd* [1999] 4 MLJ 485, the court *inter alia* held that the law is trite that a party must expressly put to the opponent's material witness its own case and such a failure might be treated as an abandonment of the pleaded case and if a party in the absence of valid reasons refrains from doing so, then he might be barred from raising it in argument. Similarly, in *Aik Ming Sdn Bhd v. Chang Ching Chuen & Ors and Another Appeal* [1995] 3 CLJ 639, the Court of Appeal held that it is essential that a party's case be put to his opponent's material witnesses

when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party without valid reasons refrains from doing so, then he may be barred form raising it in argument. In the circumstances of this case I therefore hold the view the plaintiff is not entitled to submit that the defendant is estopped from denying that the open market value of the rental is RM6,700 per month.

It is beyond dispute that the plaintiff's pleaded case is that the Tenancy Agreement had been extended for a further period of two years and that the terms and conditions therein except for the rate of rental are binding upon the plaintiff and the defendant. It is also not disputed that the defendant's defence is that the Tenancy Agreement has been extended for a further period of two years except that the monthly rental of RM6,700 was not the open market value of the rental for the premises and that the plaintiff had wrongfully terminated the Tenancy Agreement. The plaintiff instead of proving that the Tenancy Agreement had been extended for a further period of two years and that the plaintiff and the defendant are bound by the terms and conditions therein, as pleaded in his amended statement of claim had abandoned his pleading during the trial. This can be seen at p. 13 of Part B of Appeal Record when the plaintiff testified as follows:

> Saya ada lanjutkan tempoh sewaan selepas tamat 30.9.91 dengan kadar sewa yang lain. Mungkin satu tahun, saya tidak ingat, kadar sewa itu nilai semasa. Terma-terma perjanjian lanjutan itu saya tidak ingat. Tiada ada perjanjian yang baru. Saya tidak ingat ada perjanjian yang kedua. Kami setuju secara lisan. Lanjutan tempoh sewaan saya tidak ingat.

Further at p. 26 of the Appeal Record the plaintiff's counsel submitted as follows:

> Berdasarkan kepada pernyataan dan pengakuan DW1 di atas, adalah dihujahkan di sini bahawa segala terma-terma yang terkandung di dalam Perjanjian Sewa (Ekshibit P1) adalah tidak terpakai dan tidak mengikat mana-mana pihak di dalam tindakan ini. Oleh yang demikian, penyewaan kedua adalah penyewaan secara lisan dan tiada sebarang terma atau syarat yang telah ditetapkan oleh mana-mana pihak sama ada Plaintif mahupun Defendan melainkan kadar sewa yang telah ditetapkan oleh Plaintif iaitu sebanyak RM6,700,00 sebulan.

It is my finding that based on the above evidence which was given by the plaintiff and the plaintiff own counsel's submission, the plaintiff had failed to prove his pleaded case and had abandoned his pleaded case as disclosed in the amended statement of claim. In my view the learned Sessions Judge was to a certain extent misled by the evidence of the plaintiff and the submission of the plaintiff's counsel into deciding the case based on an issue, which had not been pleaded. On this point in the case of *Playing Cards*

(Malaysia) Sdn Bhd v. China Mutual Navigation Co. Ltd [1980] 1 MLJ 122 where the plaintiff's original claim is for non-delivery of goods his Lordship Gunn Chit Tuan J (as he then was) stated as follows:

> On the pleadings, the Plaintiff's claim was for non-delivery of goods and this claim could not succeed as these goods were in fact delivered. The Plaintiff's claim for alleged damages for delay was untenable as the Court could not disregard the pleadings.

Therefore on this ground alone the learned Sessions Judge should have dismissed the plaintiff's claim.

Having found that the plaintiff has failed to prove the plaintiff's claim against the defendant, I shall now proceed to deal with the defendant counter-claim. It is my finding that based on the evidence adduced the defendant has proven her counter-claim against the plaintiff. I find that the learned Sessions Judge had erred in holding that the defendant failed to give any evidence regarding the damages suffered by the defendant although the defendant did produce two witnesses to give evidence on her behalf to support her defence and counter-claim. The unchallenged and uncontradicted evidence of Winston George Beltran (DW1) is that the defendant paid a monthly rental of RM6,700 from 1 October 1991 until 30 March 1992 which is not denied by the plaintiff. The unchallenged and uncontradicted evidence of the valuer, Liew Chee Kong (DW2) and the Valuation Report exh. "D7" is that the open market value of the rental is between RM4,500 and RM4,800 per month.

Based on the evidence of DW2 and exh. "D7" and by reason of the excess payment of rental by the defendant the plaintiff, it is my view that the defendant was not indebted to the plaintiff at all. In addition thereto, by reason of the excess payment of rental, the plaintiff is indebted to the defendant in the sum of RM17,548.60. This sum of RM17,548.60 is arrived at based on the open market value of the rental of the premises at RM4,800 per month which I accepted as the fair market value as set out below:

Defendant's Losses

(A) Rental paid by defendant from 1 October 1991 to 30 June 1992	RM60,300
Rental deposit	RM13,400
Water and electricity deposit	RM 3,500

	RM77,200
	========

(B) Rental to be paid by defendant from 1 October 1991 to 30 September 1992	
@ RM4,800 per month	RM57,600
Rental to be paid by defendant from 1 October 1992 to 13 October 1992	
@ RM157.80 per day	RM 2,051.40

	RM59,651.40
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Loss suffered by defendant would be

(A) RM77,200 – (B) RM59,651.40 **RM17,548.60**

Conclusion

Based on the above-mentioned grounds I hereby allowed the appellant/defendant's appeal with costs and the judgment obtained by the plaintiff is to be set aside. Judgment is hereby given to the defendant for the defendant's counter-claim for the sum of RM17,548.60 with costs.